83-387

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES W. PUTNEY,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a railroad employee, whose employer discharged him in abrogation of the collective bargaining agreement and whose union breached its duty of fair representation, should be denied tne right to sue his employer and union together in Federal Court.

2. Whether the National Railroad Adjustment Board has exclusive jurisdiction of the dispute between railroad employee and employer, where employee's union has breached its duty of fair representation with respect to employee's wrongful discharge from employment.

3. Whether an employee's rights in actions involving breach of the union's duty of fair representation should be

different in actions under the Railway Labor Act, 45 U.S.C. §151, et seq., than in actions under the Labor Management Relations Act, 28 U.S.C. §141, et seq.

4. Whether employee must allege specific facts in support of allegations of collusion, conspiracy or implication of employer in union's wrongdoing, in his Complaint against both employer and union in Federal Court, prior to institution of discovery in the case.

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No.

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1983

JAMES W. PUTNEY, Petitioner

v.

CONSOLIDATED RAIL CORPORATION, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

The Petitioner, James W. Putney, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in this proceeding on May 3, 1983.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Fourth Circuit and the United States District Court for the District of Maryland, appear in the Appendix hereto. Each opinion was unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 1983, and this Petition for a Writ of Certiorari is timely filed within ninety days of that date. 28 U.S.C. §2101(c). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

45 U.S.C. §153 First(i)

> The disputes between an employee or group of employees and a carrier or carriers or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

29 U.S.C. §185(a)

> Suits for violation of contracts between an employer and a union organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor

organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Rule 8(a) of the Federal Rules of Civil Procedure

Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or several different types may be demanded.

STATEMENT OF THE CASE

On July 8, 1977, Petitioner was disqualified by Respondent, his employer,

from his position as yardmaster in the Baltimore Terminal, Bayview Yard, of Consolidated Rail Corporation, on account of an incident which allegedly occurred on July 7, 1977. Petitioner thereafter filed an appeal from the disqualification and pursued his grievance through three levels of administrative appeals. At each level, the order of disqualification was affirmed.

Following the final administrative ruling on August 4, 1978, Petitioner filed suit in the District Court against both Respondent and his union, Railroad Yardmasters of America, requesting money damages, reinstatement to his position, restoration of seniority and punitive damages. The basis of federal jurisdiction was diversity of citizenship, 28 U.S.C. §1332, and a federal question.

28 U.S.C. §1331; Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed.2d 173 (1944). Petitioner alleged that he was wrongfully discharged from his position as yardmaster, breach of the duty of fair representation by the union, and collusion between employer and union. Both Respondent and union filed Motions to Dismiss in the District Court. The Court denied union's Motion to Dismiss. The Court granted employer's Motion to Dismiss, stating:

> Since plaintiff's failure to exhaust his administrative remedies appears on on the face of the complaint, Conrail's motion to dismiss will be granted.

On appeal, following entry of final judgment pursuant to Rule 54(b), the Court of Appeals affirmed the District Court's ruling, holding that, absent specific allegations of collusion, con-

spiracy or implication of the employer in the wrongdoing of the union, Petitioner's exclusive remedy as against Respondent was before the National Railroad Adjustment Board. The Court of Appeals found that Petitioner's Complaint contained no such allegations. The Court of Appeals also ruled that Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976), and similar cases decided under the Labor Mangement Relations Act had absolutely no relevance in the context of a railroad employee's action against his employer and union.

REASONS FOR GRANTING THE WRIT

Under the Labor Management Relations Act, an employee who is injured by his employer's breach of a collective bargaining agreement, coupled with his union's breach of its duty of fair repre-

sentation, is clearly entitled to seek redress for his injuries against both employer and union in Federal Court. Under those circumstances, the employee is not required to first have exhausted his administrative remedies. Whether a railroad (or airline) employee who suffers the same kind of injuries should be denied the right to sue his employer in Federal Court, is an issue of general public importance, impacting on hundreds of thousands of employees in the railroad industry. Different Circuits have reached different conclusions in deciding this issue. There is a need for the Supreme Court to consider this issue in order to secure uniformity of federal law. Equally important is the question whether a railroad employee in such circumstances may sue his employer only when he alleges specific facts supporting allegations of

collusion, conspiracy, or implication by the employer in the wrongdoing of the union, in the face of the requirements of Rule 8(a) of the Federal Rules of Civil Procedure.

I.

A RAILROAD EMPLOYEE WHOSE EMPLOYER WRONGFULLY DISCHARGES HIM, AND WHOSE UNION ALSO BREACHES ITS DUTY OF FAIR REPRESENTATION, SHOULD BE PERMITTED TO SUE HIS EMPLOYER AND UNION TOGETHER IN FEDERAL COURT.

With respect to both railroad employees and employees in other industries, an employee's normal recourse against an employer which has caused him injury is under the administrative procedures provided in, respectively, the Railway Labor Act or the collective bargaining agreement. Andrews v. Louisville & Nashville Railroad Company, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972); Vaca v. Sipes, 386 U.S. 171, 87

S.Ct. 903, 17 L.Ed.2d 842 (1967). Each type of employee is, however, entitled to sue his union directly in Federal Court where the union has breached its duty of fair representation. id.; Steele v. Louisville and Nashville Railroad, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed.2d 173 (1944). The law is uncertain only with respect to the question whether the employee can sue union and employer together in Federal Court where the employer's breach of a collective bargaining agreement is coupled with the union's breach of its duty of fair representation. These are the allegations made by Petitioner in the instant suit.

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 96 S.Ct. 1048, 47 L.Ed.2d 231 (1976) and Vaca v. Sipes, supra, clearly hold that in actions under the Labor Management Relations Act an

employee may sue both employer and union in Federal Court where he alleges breach by employer of a duty under the collective bargaining agreement and breach by union of the duty of fair representation. Under these circumstances, employee is not limited to and need not exhaust the contractual grievance resolution procedures. The employee need not additionally allege collusion, conspiracy, or implication of the employer in the wrongdoing of the union. The rationale for allowing such an action against the employer is that Congress did not intend "... to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements." Vaca v. Sipes, 386 U.S. at 185, 87 S.Ct. at 903. The rule is also based on a policy decision that employees should not be forced to suffer

the ordeal of proceedings made meaningless by the union's failure or inability to properly and fairly represent its members. Employers should not be permitted to knowingly take advantage of a union's failure to represent its members properly and reap the benefits of the union's incompetence or improper conduct.

There is certainly no logical reason for the rule to be any different in a case involving a railroad employee. Industrial peace and administrative resolution of mundane grievances are unquestionably equally important considerations in both non-railroad industries and the railroad industry. By the same token, employers in both the railroad industry and non-railroad industries should not be permitted to avoid liability for their own wrongful conduct by hiding behind the

employee's union's breach of its duty of fair representation.

The issues presented in this case have not previously been decided by this Court. In Czosek v. O'Mara, 397 U.S. 25, 90 S.Ct. 770 (1970), the Court specifically did not reach the question whether the employee's suit against his railroad employer had properly been dismissed in the action in District Court. See, Hines v. Anchor Motor Freight, Inc., 424 U.S. at 568 note 9. Different Circuits have reached varying conclusions upon consideration of this issue. At least three Circuits have held that the rules pronounced in Hines v. Anchor Motor Freight, Inc., supra, and Vaca v. Sipes, supra, apply with equal force to cases under the Railway Labor Act. Richins v. Southern

Pac. Co., 620 F.2d 761 (10th Cir. 1980), cert. den., 449 U.S. 1110, 101 S.Ct. 918, 66 L.Ed.2d 838 (1981); Franklin v. Southern Pac. Transp. Co., 593 F.2d 899 (9th Cir. 1979); Price v. Southern Pacific Transp. Co., 586 F.2d 750 (9th Cir. 1978); Schum v. South Buffalo Railway Co., 496 F.2d 328 (2d Cir. 1974). Certain District Courts in other Circuits have also reached the same conclusion. Hennebury v. Transport Wkrs. U. of America, Etc., 485 F.Supp. 1319 (D. Mass. 1980); Davis v. Broth. of Ry., Airline & Steamship Clerks, Etc., 444 F.Supp. 200 (W.D. Va. 1978). At least two Circuits have held that in a suit under the Railway Labor Act there must be additional allegations of collusion, conspiracy, or implication of the employer in the wrongdoing of the union, before the employee may maintain a suit in Federal Court against his

employer. Raus v. Brotherhood Ry. Carmen of U.S. and Canada, 663 F.2d 791 (8th Cir. 1981); Goclowski v. Penn Cent. Transp. Co., 571 F.2d 747 (3d. Cir. 1978). The District Court in the instant case read the previous decisions of the Fourth Circuit Court of Appeals as stating an invariable rule that the employee must in every case under the Railway Labor Act exhaust his remedies before the National Railroad Adjustment Board, relying on Harrison v. United Transportation Union, 530 F.2d 558 (4th Cir. 1975), cert. den., 425 U.S. 958 (1976) and Dorsey v. Chesapeake & Ohio Railway Co., 476 F.2d 243 (4th Cir. 1973). The Court of Appeals in the instant case has now, although in an unreported opinion, for the first time adopted the position of the Third and Eighth Circuits.

Under the present state of the law, railroad employees have different rights as against their employers based upon the coincidence of where they happen to file their suits. This is an unhealthy situation, causing confusion in employees' exercise of their legal remedies and stimulating forum shopping. Petitioner submits that the interests of logic and consistency would be served by according railroad employees the same legal rights enjoyed by employees in other industries. Railroad employees should not be compelled to suffer indignities and injuries which other employees have adequate remedies for. Petitioner has himself been forced to suffer such indignities and injuries for over six years and should be permitted to assert his claims against his employer in Federal Court.

II.

AN EMPLOYEE'S COMPLAINT NEED NOT STATE SPECIFIC FACTS IN SUPPORT OF ALLEGATIONS OF COLLUSION, CONSPIRACY, OR IMPLICATION OF THE EMPLOYER IN THE UNION'S WRONGDOING.

The District Court and Court of Appeals in the instant case have ruled only upon Respondent's Motion to Dismiss. The allegations of Petitioner's Complaint control for the purposes of this Motion. Conley v. Gibson, 365 U.S. 41, 78 S.Ct. 99 (1957). The allegations of the Complaint are to be liberally construed in favor of the plaintiff. Jenkins v. McKeithen, 395 U.S. 411, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). Federal pleading is notice pleading and plaintiff is not required to state in detail the specific facts upon which he bases his claim. Conley v. Gibson, supra; FED.R.CIV.P. 8(a).

When the District Court ruled on Respondent's Motion to Dismiss, no discovery had yet been conducted in the case.

In the Complaint (App.8), Petitioner specifically alleged that Respondent knew of Petitioner's lack of and unfair representation by his union, and took advantage of the opportunity thus presented to present biased witnesses, improper testimony, hearsay testimony, failed to produce necessary witnesses, allowed introduction of irrelevant and prejudicial testimony, and denied Petitioner the right to confront the witnesses against him. Petitioner alleged that Respondent knowingly and intentionally misled Petitioner with regard to the purpose of the disciplinary proceedings and Respondent's intentions in those proceedings. (App. 25-32). Petitioner also alleged that Respondent's action in discharging him from his position as yardmaster was specifically motivated by racial prejudice and that it knowingly and intentionally took advantage

of the union's lack of and unfair representation to accomplish its racially discriminatory purpose. (App. 28, 32-33).

The lower courts herein have departed from the accepted and usual course of judicial proceedings by imposing on Petitioner the requirement of presenting specific facts in support of the allegations in his Complaint. Petitioner has certainly alleged sufficient facts to support findings of collusion, conspiracy, or implication of the employer in the wrongdoing of the union. Petitioner submits that it would be virtually impossible, prior to discovery, for any Respondent to make more specific allegations in this regard than Petitioner has made. Petitioner has alleged that Respondent took advantage of the union's lack of and unfair representation of Peti-

tioner, with full knowledge of the situation with respect to Petitioner's representation. The District Court and Court of Appeals, had they liberally construed Petitioner's allegations as the Federal Rules of Civil Procedure require, should have inferred that it was as a result of collusion or conspiracy that this deplorable situation was allowed to exist and continue as Petitioner made his way through the administrative appeals process. Petitioner's allegations also firmly establish some "implication of the employer in the wrongdoing of the union," one of the prerequisites for judicial review newly established by the Fourth Circuit Court of Appeals.

Petitioner has also specifically alleged that Respondent's actions in discharging him from his position as yard-

master and throughout the administrative process were motivated by racial discrimination. The inference which the Court of Appeals should properly have drawn from Petitioner's allegations, as notice pleading, was that the union secretly concurred in this practice by providing Petitioner with representatives who were untrained, inexperienced, inept, unprepared, in a conflict of interest and principal fact witnesses. Petitioner's allegations, therefore, fall squarely within those allegations recognized by this Court in Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969), as justifying subject matter jurisdiction in Federal Court for a suit by a railroad employee against his employer.

Petitioner's Complaint contains sufficient allegations to support Peti-

tioner's suit against his employer in Federal Court, even under the guidelines newly established by the Court of Appeals. The Court of Appeals' hypertechnical reading of Petitioner's Complaint seeks to impose upon Petitioner obligations not required by the Federal Rules of Civil Procedure. Petitioner's Complaint properly states a cause of action against Respondent. At the very least, Petitioner should be permitted to amend his Complaint to allow him to comply with the pleading requirements first imposed on him by the Court of Appeals, over four years after the filing of his Complaint. Petitioner has complied with the pleading requirements under Rule 8(a) of the Federal Rules of Civil Procedure and should be permitted to maintain his action against Respondent in Federal Court.

CONCLUSION

For the foregoing reasons Petitioner respectfully prays that his Petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN D. ALEXANDER, JR.
Counsel for Petitioner

DATE: July 29, 1983

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 1983, three copies of the foregoing Petition for a Writ of Certiorari were delivered by hand to Mark J. Daneker, Esquire, David C. Daneker, Esquire, and Steven A. Loewy, Esquire, 1000 Maryland Trust Building, Baltimore, Maryland 21202.

Of Counsel for
Petitioner

APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JAMES W. PUTNEY *

Appellant *

v. *

CONSOLIDATED RAIL CORPORATION, a Pennsylvania Corporation *

Appellee NO. 82-1814 *

and *

RAILROAD YARDMASTERS OF AMERICA, an unincorporated association, *

Defendant

* * * * * * * * * * * *

PER CURIAM:

The plaintiff, James W. Putney, brought suit in federal district court, alleging that his union, Railroad Yardmasters of America, breached its duty of fair representation in the course of discharge proceedings brought against Putney by the employer, Consolidated Rail

Corporation ("Conrail"). In addition, Putney's complaint named Conrail as a defendant and alleged that the employer had discharged him in abrogation of the collective bargaining agreement. The complaint sought reinstatement, back pay, restoration of seniority benefits, and punitive damages against both defendants.

The district court refused to dismiss the suit against the union on a Fed. R. Civ. P. 12(b) motion. However, it dismissed the suit against defendant Conrail on the theory that, under the Railway Labor Act, the National Railroad Adjustment Board has exclusive jurisdiction of the dispute between Putney and Conrail. 45 U.S.C. §153 First (i). A Fed. R. Civ. P. 54(b) judgment was entered, rendering the decision with respect to Conrail final and appealable.

Having failed to allege any collusion, conspiracy, or implication of the employer in the wrongdoing of the union, Putney was bound to pursue his contractual claim against the carrier, Conrail, not in federal court, but before the National Railroad Adjustment Board. See Raus v. Brotherhood of Railway Carmen, 663 F.2d 791 (8th Cir. 1981); Goclowski v. Penn Central Transportation Co., 571 F.2d 747 (3d Cir. 1977). See also Harrison v. United Transportation Union, 530 F.2d 558 (4th Cir. 1976), cert. denied, 425 U.S. 958 (1976).

Plaintiff has argued that Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), a case decided under the Labor-Management Relations Act, 29 U.S.C. §141 et seq., compels a different conclusion. However, the contention is without merit. The language of the RLA differs materially

from the language of the LMRA, and mandates a different result. As the Supreme Court noted in Andrews v. Louisville & Nashville R.R., 406 U.S. 320, 323 (1972):

> [S]ince the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that ... stems not from any contractual undertaking ... but from the Act itself, the case for insisting on resort to those remedies is if anything stronger ... than it is in cases arising under §301 of the LMRA.

AFFIRMED.

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND

JAMES W. PUTNEY	*	
Plaintiff	*	
v.	*	
CONSOLIDATED RAIL CORPORATION, a Pennsylvania Corporation	*	
	*	CIVIL NO.:
and		JH-79-256
	*	
RAILROAD YARDMASTERS OF AMERICA, an unincorporated association,	*	
	*	
Defendants		

* * * * * * * * * * * *

MEMORANDUM

Plaintiff James W. Putney brings this action under the Railway Labor Act, 45 U.S.C. § 151 et seq., against his employer, Consolidated Rail Corporation ("Conrail") and his union, Railroad Yardmasters of America ("the Union"). Both defendants have moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b),

on the grounds that this Court lcks subject-matter jurisdiction and that the complaint fails to state a claim upon which relief can be granted. A hearing on the defendants' motions was held on May 21, 1981. For the reasons stated herein, defendant Conrail's motion to dismiss will be granted and the Union's motion will be denied.

Background

Plaintiff was employed by Conrail as yardmaster in the Baltimore railroad terminal. On July 8, 1977, Conrail terminated plaintiff's employment. Immediately thereafter, plaintiff notifed the local chairman of the Union and initiated an appeal of his employment termination.

The first appeal was processed before a hearing officer pursuant to the grievance procedures outlined in the

collective bargaining agreement. Witnesses were called and examined by the plaintiff, the Union and Conrail. The hearing officer denied the appeal and affirmed the termination.

The Union, as plaintiff's representative, appealed the decision of the hearing officer to Conrail's Manager of Labor Relations, R.M. Schaible ("Schaible"). By mutual agreement, the Union and Conrail scheduled a hearing before Schaible on October 20, 1977. The plaintiff alleges that he was not notified of the October 20, 1977 appeal hearing until after it was held. Schaible denied plaintiff's appeal by letter of October 21, 1977.

Thereafter, the Union appealed Schaible's decision to J.R. Walsh ("Walsh"), Senior Director of Labor Relations for Conrail and the highest

officer designated by Conrail to handle grievances submitted by the Union. While the appeal to Walsh was pending, the plaintiff retained private counsel to assist the Union with the appeal. The Union and plaintiff's attorney jointly represented plaintiff until July 27, 1978; on that date, plaintiff's counsel requested the Union to withdraw from the case. On August 4, 1978, the appeal to Walsh was denied.

On August 28, 1978, having withdrawn from the case at plaintiff's request, the Union sent a letter to plaintiff's counsel which states in pertinent part:

> Again I want to advise you that you now have (6) six months from the date of the denial from J.R. Walsh, August 4, 1978, in which to institute proceedings before an appropriate adjustment board established under

> Section 3 Second of the Railway Labor Act as amended. Failure to do this means that the case would be barred from any further handling, as prescribed by Rule 4-G-1 (j) of our scheduled agreements.

One day past the expiration of the six-month limitation period for appealing the Walsh decision to the Adjustment Board, plaintiff instituted this suit alleging that Conrail breached the collective bargaining agreement and that the Union breached its statutory duty of fair representation. In this action, plaintiff seeks reinstatement as a yardmaster, restoration of his seniority and punitive damages from Conrail, and lost wages, other compensatory damages, attorneys' fees and costs from both defendants.

Discussion

The Railway Labor Act ("the Act") is applicable to minor disputes arising between carriers and their employees. 45 U.S.C. § 153 First (i). The Act also establishes a Union's statutory duty of fair representation. See Steele v. Louisville & N. R. Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944). However, the Act's provision for a National Railroad Adjustment Board with exclusive jurisdiction to resolve disputes between carriers and their employees does not extend to union-employee conflicts. Ferro v. Railway Express Agency, Inc., 296 F.2d 847 (2d Cir. 1961). Because the two claims asserted by the plaintiff, i.e., a breach of the collective bargaining agreement by Conrail and the Union's breach of its duty of fair representation, rest on separate bases, each will be considered

separately.

The Claim Against Conrail

The Court notes that in determining whether to dismiss a complaint, it must view the allegations in a light most favorable to the plaintiff. Conley v. Gibson, 365 U.S. 41, 45-46 (1957). In examination of his complaint, it is apparent that plaintiff does not allege that he sought relief before the National Railroad Adjustment Board ("the Adjustment Board") nor has he alleged that he exhausted his administrative remedies. Thus, it is evident that the plaintiff has not alleged any facts in support of his claims entitling him to relief, and his action against Conrail must be dismissed.

The Act provides the exclusive remedy for a railroad employee's grievance against his employer with regard to any minor contractual dispute. 45 U.S.C.

§153 First (i). The Act requires that an employee exhaust his administrative remedies before the Adjustment Board prior to bringing suit in district court. Andrews v. Louisville & Nashville Railroad Company, 406 U.S. 320 (1972). This Circuit has made it clear that there is no exception to the exhaustion requirement. Harrison v. United Transportation Union, 530 F.2d 558 (4th Cir. 1975); Hill v. Southern Railway Co., 402 F. Supp. 414, 418 (W.D.N.C. 1975); Dorsey v. Chesapeake & Ohio Railway Co., 476 F.2d 243 (4th Cir. 1973); see, contra, Schum v. South B. R. Co., 496 F.2d 328 (2d Cir. 1974).

In the instant case, plaintiff's claim that he was wrongfully discharged in violation of the collective bargaining agreement is a "minor dispute" within the exclusive jurisdiction of the Adjustment Board. Andrews v. Louisville & Nashville

Railroad Co., supra. Although the Union notified plaintiff of the Adjustment Board's jurisdiction in this matter, on advice of counsel, plaintiff chose to forego this exclusive remedy and filed this federal civil action after the Adjustment Board's jurisdiction lapsed. Since plaintiff's failure to exhaust his administrative remedies appears on the face of the complaint, Conrail's motion to dismiss will be granted.

The Claim Against the Union

Since the Adjustment Board's jurisdiction does not extend to union-employee disputes, Ferro v. Railway Express, supra, the exhaustion of administrative remedies requirement does not attach to the claim against the Union. Therefore, plaintiff's claim of unfair representation against the Union is properly before this Court, Jones v. Trans

World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974), and the Union's motion to dismiss for lack of jurisidiction under Fed.R.Civ.P. 12(b)(1) fails.

The Union's motion to dismiss for failure to state a claim upon which relief can be granted, pursuant to Fed.R.Civ.P. 12 (b)(6), must also be denied. In order to state a claim of unfair representation, plaintiff must allege arbitrary, discriminatory or bad faith conduct on the part of the Union. Vaca v. Sipes, 386 U.S. 171, 190-93 (1967). A fair reading of plaintiff's complaint indicates that he has alleged those elements. See Motor Coach Employees v. Lockridge, 403 U.S. 274, 299 (1971) and Complaint at §§18 and 24.

The Court will enter a separate Order.

Joseph C. Howard
United States District
Judge

Date: June 2nd, 1982

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND

JAMES W. PUTNEY	*	
Plaintiff	*	
v.	*	
CONSOLIDATED RAIL CORPORATION, a Pennsylvania Corporation	*	
	*	CIVIL NO: JH-79-256
and	*	
RAILROAD YARDMASTERS OF AMERICA, an unincorporated association,	*	
	*	
Defendants		

* * * * * * * * * * * *

ORDER

Pursuant to the foregoing Memorandum, it is this 2nd day of June, 1982, by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendant Consolidated Rail Corporation's motion to dismiss shall be, and the same hereby is, GRANTED;

(2) that defendant Railroad Yardmasters of America's motion to dismiss be, and the same hereby is, DENIED; and

(3) that the Clerk of the Court shall mail copies of the foregoing Memorandum and this Order to all parties.

Joseph C. Howard
United States District Judge

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MARYLAND

JAMES W. PUTNEY	*	
Plaintiff	*	
v.	*	
CONSOLIDATED RAIL CORPORATION, a Pennsylvania Corporation	*	
	*	CIVIL ACTION NO.:
and	*	B-79-256
RAILROAD YARDMASTERS OF AMERICA, an unincorporated association,	*	
Defendants	*	

* * * * * * * * * * *

COMPLAINT

James W. Putney, Plaintiff, by ALLEN, THIEBLOT & ALEXANDER and JOHN D. ALEXANDER, JR., his attorneys, sues Consolidated Rail Corporation and Railroad Yardmasters of America, Defendants, and says:

1. Plaintiff is a resident and citizen of the State of Maryland.

2. Defendant Consolidated Rail Corporation (hereafter sometimes "Conrail") is a body corporate organized under the laws of and having its principal place of business in the Commonwealth of Pennsylvania. Conrail does business within the District of Maryland as an interstate common carrier by railroad, an industry affecting commerce.

3. Defendant Railroad Yardmasters of America is an unincorporated association having its principal offices in the Commonwealth of Pennsylvania. Defendant Railroad Yardmasters of America (sometimes hereafter "Railroad Yardmasters") is a labor organization formed for the purpose, among other things, of representing persons employed as yardmasters by Conrail and other common carriers pursuant to collective bargaining agreements. Railroad Yardmasters performs its business

of representation of employees of Conrail in an industry affecting commerce within the District of Maryland and maintains a Local Lodge of the Railroad Yardmasters within the District of Maryland known as Conrail Local Lodge No. 76.

4. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars.

5. This action arises under 29 U.S.C. Section 185, Section 301 of the Labor Management Relations Act, 1947, 61 Stat. 156.

6. At all times relevant, Plaintiff was and is an employee of Defendant Conrail.

7. At all times relevant, Plaintiff was and is a member of Defendant Railroad Yardmasters.

8. At all times relevant, Defendant Railroad Yardmasters was the duly

accredited representative of Plaintiff pursuant to a collective bargaining agreement by and between Railroad Yardmasters and Conrail.

9. On July 8, 1977, Plaintiff was disqualified from his position as yardmaster in the Baltimore Terminal, Bayview Yard, of Conrail on account of an incident which allegedly occurred on July 7, 1977, a copy of which letter of disqualification is attached hereto as a part hereof marked Exhibit No. 1.

10. Thereafter C.E. Thomas, Local Chairman of Railroad Yardmasters, and at all times relevant an agent thereof, purported to represent Plaintiff pursuant to the terms of the collective bargaining agreement between Conrail and Railroad Yardmasters by filing an appeal from the disqualification on July 14, 1977. A copy of the letter of appeal from Local Chair-

man Thomas To J.R. Dougherty, TrailMaster, Conrail, dated July 14, 1977, is attached hereto as a part hereof marked Exhibit No. 2. This appeal was represented by Local Chairman Thomas to Plaintiff to include both a claim for reinstatement and lost wages.

11. Trainmaster Dougherty replied to Plaintiff and Local Chairman Thomas by letter of July 21, 1977, arranging for a hearing on July 28, 1977, a copy of which letter is attached hereto as a part hereof marked Exhibit No. 3.

12. At a hearing on July 28, 1977, Plaintiff was purportedly represented by Local Chairman C.E. Thomas and Donald Cadwell, a member of Railroad Yardmasters from the Philadelphia, Pennsylvania area.

13. As a result of the original hearing, it was ruled by Donald Shipley,

the Hearing Officer, an employee of Conrail, that Plaintiff was to be disqualified as Yardmaster. A Notice of Discipline was issued on August 4, 1977, signed by F.I. Doebber, Superintendant, a copy of which is attached hereto as a part hereof marked Exhibit 4.

14. Thereafter, Local Chairman Thomas purported to enter an appeal and an appeal hearing was held on October 20, 1977 in Philadelphia, Pennsylvania, before R.M. Schaible, Manager, Labor Relations, an employee of Conrail. Plaintiff was never notified of this appeal hearing. The Appeal Hearing Officer sustained the Notice of Discipline and issued a letter ruling dated October 21, 1977, a copy of which is attached hereto as a part hereof marked Exhibit No. 5. This appeal was represented by Local Chairman Thomas to

Plaintiff to include both a claim for reinstatement and lost wages.

15. Thereafter, Joseph C. Thomas, General Chairman of Railroad Yardmasters appealed from the appeal hearing to J.R. Walsh, Senior Director of Labor Relations, an employee of Conrail, by letter dated October 26, 1977, a copy of which is attached hereto as a part hereof marked Exhibit No. 6.

16. Thereafter, J.R. Walsh, Senior Director-Labor Relations, an employee of Defendant Conrail, denied Plaintiff's appeal in its entirety and purported to withdraw an offer to restore Plaintiff to seniority on a leniency basis and also ruled that Plaintiff had forfeited his seniority by his failure to exercise options purportedly available to him pursuant to the collective bargaining agreement. The decision letter also ruled

that Plaintiff's claim for wages was denied because the same had never been properly appealed. The decision letter dated August 4, 1978, is attached hereto as a part hereof marked Plaintiff's Exhibit No. 7.

17. Plaintiff was guilty of no conduct which would justify his disqualification as a Yardmaster, his loss of seniority and loss of wages.

18. Plaintiff's disqualification, his loss of seniority and loss of wages were the proximate result of Railroad Yardmasters' breach of its duty to fairly represent Plaintiff as Plaintiff's duly accredited representative. Among other things, Defendant Railroad Yardmasters provided Plaintiff with an inexperienced representative in the person of Local Chairman Thomas, a person known by both Railroad Yardmasters and Conrail to be new

on the job as Local Chairman and extremely inexperienced and inept in matters of representation in disqualification proceedings. Furthermore, known to both Railroad Yardmasters and Conrail, Local Chairman Thomas was the Chief Acting Yardmaster at the Bayview Yard at the time of the occurrence and was responsible for the movement of trains therein. Local Chairman Thomas was a principal fact witness regarding the occurrence because he was directly in the chain of command commencing with Trainmaster Dougherty, Local Chairman Thomas himself as Acting Yardmaster and Plaintiff acting as Assistant Yardmaster and was intimately familiar with the incident in particular and the operation of the yard in general and the relationship between Trainmaster Dougherty and Plaintiff. Notwithstanding this, Local Chairman Thomas with the

knowledge of Conrail was allowed to and did continue to purport to represent Plaintiff though he was unable to do so and in a direct position of conflict of interest and a principal fact witness. Plaintiff was also provided with the purported assistance of one Donald Cardwell, a member of Railroad Yardmasters from the Philadelphia, Pennsylvania area, which member did not take sufficient time to familiarize himself with and investigate the complex facts surrounding the subject matter of the disciplinary hearing and whose participation at the hearing was counterproductive. In fact at the hearing Plaintiff was forced principally to represent himself though he was inexperienced in such matters and has no learning or experience with disqualification hearings pursuant to the collective bargaining agreement. Extensive hearsay

evidence in both written and documentary form was allowed to be introduced against Plaintiff without the objection of his representatives. Plaintiff was charged at the hearing with purported prior instances of misconduct which were not the subject matter of the present disciplinary charge against him. Plaintiff's representative knew that Trainmaster Dougherty had a specific and racial prejudice against Plaintiff, yet offered no testimony on this subject, and declined to do so, though Trainmaster Dougherty was a principal fact witness against the Plaintiff and had a conflict of interest himself since he was in overall charge of the Yard and in fact intervened in and disrupted the movement. Plaintiff's representative failed to call and produce all necessary fact witnesses, and to request a postponement when necessary

witnesses were absent, or to attempt to produce them. Plaintiff was assured by his representatives that he should limit his defenses and not raise important issues and assert objections. Plaintiff was never advised by his representatives of his rights pursuant to the collective bargaining agreement, of his right to be personally present at the time of appeal procedures, or of the fact of the appeal procedures. Plaintiff was never adequately and timely advised and was misadvised of the option which was purportedly available to him to accept a position as yardmaster elsewhere for Conrail and retain his seniority.

19. Defendant Conrail contends that Plaintiff's representatives failed to properly appeal his claim for loss wages and that the same was never properly the subject of hearing pursuant to the

collective bargaining agreement and is barred. If this be so, Plaintiff's purported loss of that claim, was directly due to the negligence and incompetence of Defendant Railroad Yardmasters.

20. Plaintiff's lack of and unfair representation and the matters and facts set forth in the foregoing Paragraphs 18 and 19 were, at all times relevant, known or should have been known upon proper investigation to Defendant Conrail. Defendant Conrail affirmatively presented at the hearing against Plaintiff biased witnesses, improper testimony, hearsay testimony, failed to produce necessary witnesses, allowed the introduction of irrelevant and prejudicial testimony and denied Plaintiff his right to confront witnesses.

21. Further, prior to the original hearing, Plaintiff was affirma-

tively assured by Terminal Superintendent L.T. Glenn, an agent of Conrail, that Plaintiff had no need to overly concern himself about or prepare for the disciplinary hearing, since things would not be that serious and said "I will see that you get the benefit of the doubt" and that things "will not go hard for you". Instead Terminal Superintendent L.T. Glenn, was a principal witness against Plaintiff, introduced improper, irrelevant and hearsay written and oral testimony, and urged and obtained Plaintiff's disqualification.

22. The conduct of Defendant Conrail and its agents, servants and employees was in bad faith and with malice and with a direct intention to injure Plaintiff and deprive Plaintiff of his position, seniority, wages and livelihood,

without due process of law and in breach of the collective bargaining agreement.

23. Plaintiff's losses were the direct result of his grossly negligent representation by Railroad Yardmasters and as a result of an unfair disciplinary procedure conceived and carried out by Defendant Conrail in a grossly negligent manner and with actual bad faith and malice.

24. The hearing and appeal procedures as conducted by both Defendants were in violation of the terms of the collective bargaining agreement. The hearing and appeal procedures as conducted by both Defendants were discriminatory in that others responsible for the incident were not charged or disciplined. The hearing and appeal procedures as conducted by both Defendants were arbitrary and

capricious and the results were based upon no substantial evidence.

25. As a direct result of the aforesaid conduct of Defendants, Plaintiff to date has lost wages in excess of $25,000.00 and such losses continue. Plaintiff has also lost and will continue to lose sums of money in connection with union dues and medical insurance premiums and has and will expend sums of money for attorney's fees and suit money.

WHEREFORE, Plaintiff demands:

A. Plaintiff's disqualification as a Yardmaster be rescinded and Plaintiff be reinstated.

B. Plaintiff be restored to his seniority as a Yardmaster.

C. Plaintiff be awarded against both Defendants all wages and other sums that he has lost by reason of his disqua-

lification in the amount of $75,000.00 and costs.

D. Plaintiff be awarded against Defendant Conrail punitive damages for thier conduct in the amount of $150,000.00

E. Plaintiff be awarded against both Defendants attorneys' fees and suit money.

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FILED
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ALEXANDER L. STEVAS,
CLERK

No. 83-387

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JAMES W. PUTNEY,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID C. DANEKER,
MARK J. DANEKER,
STEVEN A. LOEWY,
CONSTABLE, ALEXANDER,
DANEKER & SKEEN,
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(301) 539-3474,
Counsel for Respondent.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that the Adjustment Board has exclusive jurisdiction over the minor dispute claim against the employer railroad, which jurisdiction cannot be avoided merely by alleging that the union breached its duty of fair representation.

2. Whether the Court of Appeals correctly held that, absent an allegation of collusion or conspiracy between a railroad and a union, a railroad employee cannot institute in the federal courts a breach of contract action for a minor dispute claim.

3. Whether, in a minor dispute arising under the Railway Labor Act, the Court of Appeals properly limited the application of Labor Management Relations Act precedents because of the Railway Labor Act's jurisdictional provision requiring the arbitration of minor disputes before the Adjustment Board.

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NO. 83-387

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JAMES W. PUTNEY

Petitioner

v.

CONSOLIDATED RAIL CORPORATION

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Consolidated Rail Corporation ("Conrail") adopts the facts delineated in the United States District Court's opinion (Petitioner's Appendix at 6-9), adding the following facts which are pertinent to the lower court's determination of the exclusive jurisdiction of the Adjustment

Board over minor disputes.

James W. Putney ("Petitioner") was disqualified from his supervisory position of yardmaster with Conrail for cause in accordance with the applicable bargaining agreement. See Petitioner's Court of Appeals Brief, Joint Appendix "JA") 12. Petitioner's union, the Railroad Yardmasters of America (the "Union"), appealed Petitioner's disqualification in accordance with the grievance procedures of the collective bargaining agreement. Petitioner retained counsel and requested that the Union withdraw as his representative. Thereafter, Petitioner's appeal at the third stage was denied. The Union then advised Petitioner that:

> ...you now have six (6) months from the date of the denial in which to initiate proceedings before an appropriate adjustment board established under Section 3 Second of the Railway Labor Act, as amended. Failure to do this means the case would be barred any further handling, as prescribed by Rule 4-6-1(j) of our scheduled agreements.

Petitioner did not appeal his disqualification to the Adjustment Board for a final arbitrative determination. Instead, after the expiration of the six month period, he filed this action in District Court, alleging that Conrail breached the collective bargaining agreement and that the Union breached its duty of fair representation. Petitioner's Complaint did not allege collusion between Conrail and the Union.

The District Court granted Conrail's Motion to Dismiss the Complaint for lack of subject matter jurisdiction, holding that Petitioner's Complaint involved only a "minor dispute" under the Railway Labor Act ("RLA") over the interpretation of a collective bargaining agreement. Therefore, the Adjustment Board had exclusive jurisdiction to resolve the dispute.

The Union's Motion to Dismiss was denied on other grounds, and the claim

against the Union remains pending before the District Court. Final judgment was entered dismissing the claim as to the railroad.

On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's dismissal of Petitioner's contract claims against Conrail because of the exclusive jurisdiction of the Adjustment Board. The Court of Appeals noted that Petitioner's failure to allege "collusion, conspiracy, or implication of the employer in wrongdoing of the union" limited him to pursuit of his contract claim before the Adjustment Board. The Court relied, in part, on Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 323 (1972), and noted that Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), which was decided under the Labor Managment Relations Act ("LMRA"), is inapplicable to RLA minor disputes.

REASONS FOR DENYING THE WRIT

This case involves no questions of law that are novel or worthy of review. The decisions below are consistent with prior decisions of this Court and involve no substantial issues in dispute among the circuits. Therefore, the petition should be denied.

Petitioner's only claim against Conrail involves a minor dispute, which this Court repeatedly has stated must be resolved by adherence to the exclusive arbitration procedure mandated by the Railway Labor Act. Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 94, rehearing denied, 439 U.S. 1135 (1978); Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972). Petitioner's reliance on non-Railway Labor Act precedents is misplaced because of the RLA's unique mandatory procedures for the resolution of breach of contract claims such as that of Petitioner.

SUMMARY OF ARGUMENT

1. This case involves a minor dispute under the Railway Labor Act. Such minor disputes are within the exclusive jurisdiction of the National Railroad Adjustment Board. Awards of the Adjustment Board are final and binding, subject to judicial review only on limited bases set forth in the Railway Labor Act, none of which are advanced by Petitioner here.

2. A minor dispute claim against a railroad employer and a fair representation claim against a union are two separate matters, dealt with separately by the Adjustment Board and the federal courts. An employee with only a fair representation claim against a union cannot also litigate a minor dispute case against the employer in federal court. Although Petitioner now argues that allegations of collusion between the Union and Conrail confer jurisdiction over Conrail, Petitioner failed to allege collusion in his amended and corrected Complaint. Even if collusion

had been alleged, the better reasoned cases hold that the federal courts do not have jurisdiction over the minor dispute claims against a railroad employer.

3. Cases decided under the LMRA are inapplicable to issues of federal court jurisdiction over a railroad employer in a RLA minor dispute becasue "[t]he language of the RLA differs materially from the language of the LMRA and mandates a different result." Court of Appeals Opinion, JA 4. The Court has emphasized the unique character of labor relations udner the RLA, and cautioned against reference to LMRA cases when deciding cases brought under the RLA.

ARGUMENT

I

THE NATIONAL RAILROAD ADJUSTMENT BOARD HAS EXCLUSIVE JURISDICTION OVER A "MINOR DISPUTE" UNDER THE RAILWAY LABOR ACT

The U.S. Court of Appeals for the Fourth Circuit correctly affirmed the

District Court's dismissal of Petitioner's Amended Complaint against Conrail because the Complaint states only a "minor dispute."

Minor disputes are within the exclusive jurisdiction of the National Railroad Adjustment Board. The holding was clearly in harmony with the decisions of this Court and is settled law.

Petitioner's grievances and claims for breach of contract create a classic "minor dispute," as defined by the RLA and as applied in numerous cases, e.g., Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 94, rehearing denied 439 U.S. 1135 (1978), Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972).

It is well established that minor disputes under the RLA must be processed in the usual manner to the highest carrier officers designated to handle them and ultimately are appealable exclusively to the Adjustment Board. Railway Labor Act,

45 U.S.C. §153, First(i). In Andrews, 406 U.S. at 325-26, this Court held that the courts lack jurisdiction to adjudicate a discharged railroad employee's minor dispute. The Court clearly indicated that the Adjustment Board was the employee's exclusive recourse. 406 U.S. at 322. ("[T]he notion that the grievance and arbitration procedures provided for minor disputes in the [RLA] are optional, to be availed of as the employee or the carrier chooses, is no longer good law.").

This Court, in Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 93-94 (1978), a per curiam decision, emphatically reiterated the exclusive jurisdiction of the Adjustment Board, and identified only three narrow statutory grounds on which Adjustment Board awards and orders are subject to judicial review. Those provisions deal with court review or enforcement of Adjustment Board awards, and come into play only when an

award--otherwise "final and binding"--has been issued. Railway Labor Act, 45 U.S.C. §153, First (m), (p), and (q). On such review the district courts' power is only to enforce, set aside, or remand an award to the Adjustment Board for further action. Petitioner has not urged any of these three bases for federal court jurisdiction of his claim; nor has Petitioner challenged the District Court conclusion that the dispute between Conrail and Petitioner was a minor dispute.

Petitioner voluntarily chose not to pursue his minor dispute before the Adjustment Board. Apparently upon the advice of private counsel, and contrary to the recommendation of his Union, Petitioner decided to forego the administrative route. Petitioner's choice does not create jurisdiction in the federal court. The Railway Labor Act recognizes the right of claimants to be represented by counsel before the Adjustment Board. Railway Labor

Act, 45 U.S.C §153, First(j). Individuals may make such a choice on notice to the Union. Elgin, Joliet & Eastern Railway Co. v. Burley, 327 U.S. 661, 666 n.9 (1946). The retention of private counsel does not obviate Adjustment Board jurisdiction. It is beyond doubt that Petitioner's exclusive recourse was to the Adjustment Board. See, e.g., Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972); Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978); Harrison v. United Transportation Union, 530 F.2d 558 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976).

II

ALLEGATIONS BY A RAILROAD EMPLOYEE THAT HIS UNION BREACHED ITS DUTY OF FAIR REPRESENTATION DO NOT CREATE JURISDICTION IN THE FEDERAL COURT TO DETERMINE HIS MINOR DISPUTE WITH HIS EMPLOYER

In addition to alleging a minor dispute, Petitioner's complaint alleges

lack of fair representation by the union. A court has jurisdiction to hear an employee's claim against his union for breach of its duty of fair representation, but does not have jurisdiction over the underlying minor dispute claims against a railroad employer.

The essential rationale for the former jurisdiction is that the union has an implied statutory duty of fair representation and that the RLA does not give the Adjustment Board jurisdition to resolve union-employee disputes. Ferro v. Railway Express Agency, Inc., 296 F.2d 847 (2nd Cir. 1961).

The tests for employer involvement with invidious discrimination against employees by a union in a situation which might also involve a grievance are set forth in Glover v. St. Louis-San Francisco Railway Co., 393 U.S. 324 (1969). This Court held there that resort to an Adjustment Board might be obviated where

"the effort to proceed formally with contractual remedies would be wholly futile," 393 U.S. at 330, in cases where "no meaningful distinction can be drawn between discriminatory action in negotiating the terms of an agreement and discriminatory enforcement of terms that are fair on their face," 393 U.S. at 329. The allegations in Glover were that the union and the employer, for motives of racial prejudice, jointly ignored and misadministered the clear terms of the agreement by "schemes and contrivances to bar Negroes from promotion wholly because of race." 393 U.S. at 331. No such invidious joint action is even suggested here. Conrail simply disqualified Petitioner for cause, the union proceeded to handle grievance in the usual manner, and Petitioner chose to go his own way with counsel, rather than permitting the union to continue as his representative. Conrail had no involvement in any conspiracy or

invidious concerted action with the union, and none was alleged.

However, the rationale for federal court jurisdiction over the fair representation claim against the Union does not allow the courts to extend jurisdiction to the employer in the absence of invidious and unfairly motivated joint action. Claims against the Union and Conrail rest on entirely different bases and involve separate liabilities. Conley v. Gibson, 355 U.S. 41 (1957) and Czosek v. O'Mara, 397 U.S. 25 (1970) establish that the minor dispute claim against the employer and the fair representation claim against the union should be treated as two separate matters and can be dealt with separately by the Adjustment Board and the federal court.

In Bowen v. U.S. Postal Service, __U.S.__, 103 S.Ct. 588 (1983), this Court re-emphasized the separate liabilities of employers for breach of contract and unions

for failure to represent. Bowen pointed out that the Railway Labor Act allows an individual employee to go to an Adjustment Board, thus implying that that is the sole remedy of the employee. Bowen, ___U.S. at ___, 103 S.Ct. at 598, n.18. It also noted that in Czosek, the railroad had been dismissed at an early stage of the case, in view of the exclusive jurisdiction of the Adjustment Board.

None of the cases cited by Petitioner hold that an employee with only a fair representation claim against the union may, by virtue of that fact, litigate a minor dispute claim against the employer. Each of the cases cited by Petitioner involves allegations of joint action, collusion, or conspiracy between the union and the railroad, none of which are present in the instant case, that may establish a special nexus for consideration of jurisdiction over the employer.

Petitioner has not alleged

union-employer collusion or conspiracy in this case. He now argues that to allege collusion or conspiracy implicating the employer in the union's wrongdoing, the employee "need not state specific facts in support of [such] allegations. . ." Petitioner's Petition at p. 18. However, Petitioner not only failed to state "specific facts," he failed to make even general allegations of collusion, conspiracy, or implication in alleged wrongdoing. Petitioner corrected or amended his Complaint three times, but never included such allegations. Petitioner alleges in his Amended Complaint only that Conrail knew or should have known, upon proper investigation, of the unfair representation of the union, and that Conrail erred in processing the dispute. The Supreme Court has characterized collusive actions as those "tying the union and employer together." Czosek v. O'Mara, 397 U.S. at 30. Thus, as

both the District Court and the Court of Appeals held, Petitioner's Complaint lacks well pled allegations of collusion.

Even when collusion between the union and the employer is well pled, the better reasoned cases hold that the federal courts do not have jurisdiction of the minor dispute claim against the employer. See, e.g., Goclowski v. Penn Central Transportation Co., 571 F.2d. 747 (3rd Cir. 1977); Connor v. Brotherhood of Railway Airline and Steamship Clerks, AFL-CIO, 496 F.Supp. 154 (M.D. Pa. 1980). These cases recognize that (a) Andrews v. Louisville & Nashville Railway Co., 406 U.S. 320 (1972) expressly places jurisdiction over minor disputes exclusively with the Adjustment Board; (b) federal court jurisdiction is limited to the exceptions delineated in Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, rehearing denied, 439 U.S. 1135 (1978); and (c) the minor dispute action is distinct from the unfair representation

action and can be dealt with separately and fairly. A fundamental danger in permitting allegations of collusion to provide entry to the federal courts was noted in Connor, 496 F.Supp. at 157: "It does not make sense to hold that a plaintiff could bypass the Board and bring these disputes into court simply by alleging collusion between the union and employer."

III.

THE DISTINCTIVE STATUTORY PATTERNS OF THE LABOR MANAGEMENT RELATIONS ACT AND THE RAILWAY LABOR ACT RECOGNIZED IN REGARD TO JURISDICTION OVER THE EMPLOYER

Petitioner relies upon the LMRA cases, such as Vaca v. Sipes, 386 U.S. 171 (1967) and Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), to open the federal court door to subject matter jurisdiction over the minor dispute action against the employer railroad. However, these cases are inapplicable to issues of federal court jurisdiction over an employer in a minor

dispute case under the RLA because "[t]he language of the RLA differs materially from the language of the LMRA and mandates a different result." Court of Appeals Opinion, JA 4.

This Court has emphasized the unique character of labor relations under the RLA:

> The Railway Labor Act is essentially an instrument of industry-wide government (citation omitted). The railroad world for which the Act was designed has been described as a state within a state.... Congress has not only carved this singular industry out of the [LMRA], but it has provided, by the RLA, techniques peculiar to that industry.

California v. Taylor, 353 U.S. 553, 565-66 (1957).

The Court has cautioned against reliance on LMRA principles in dealing with Railway Labor Act cases. Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969).

29 U.S.C. §185 provides the federal courts with jurisdiction to resolve an LMRA employee's minor dispute claim based on a collective agreement against the employer

alone. See, e.g., Smith v. Evening News Association, 371 U.S. 195 (1962). There is There is no comparable jurisdictional provision under the RLA. In fact, the RLA provides for the exclusive administrative processing of an employee's minor dispute. See, e.g. Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320 (1972). The LMRA expressly excludes from its regulatory scheme "any person subject to the Railway Labor Act," 29 U.S.C. §152(2), and any individual employed by such person, 29 U.S.C. §152(3).

The judicial focus on exhaustion of administrative remedies in LMRA cases is appropriate because the statutory right of LMRA employees to have minor dispute cases adjudicated by the judiciary can be made conditional on a resort to administrative remedies if the employer and union so agree. On the other hand, in RLA cases, the courts have properly focused on the nature of the dispute because the

Adjustment Board has exclusive jurisdiction to resolve minor disputes, and, except for the three limited areas enumerated in Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978), the courts lack jurisdiction to resolve such breach of contract claims. Even after review under Sheehan, the courts are authorized only to enforce, set aside, or remand a case to the Adjustment Board.

Petitioner contends that the U.S. Supreme Court, in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), an LMRA case, intended to clarify earlier cases and eliminate doubts about federal court jurisdiction over the railroad employer in suits where unfair representation by the union was alleged. It is clear Hines does not affect applying RLA precedents. Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 (1978), was decided by the U.S. Supreme Court without reference to Hines or any other LMRA cases, indicating the inapplicability of the Hines prcedent to

the RLA. On the contrary, Bowen v. U.S. Postal Service, took the occasion to point out again the separate position of railroad employees. ___U.S.__, 103 S.Ct. at 598.

In short, LMRA precedents are inapplicable to RLA cases for clear and purposeful reasons.

CONCLUSION

The petition for certiorari should be denied because the courts below applied a proposition on which the law is clear; there is no federal court jurisdiction under the Railway Labor Act over a minor dispute claim against an employer, nor is such jurisdiction established by the allegation of a breach of the union's duty of fair representation. A definite showing of invidious, unfair and discriminatory joint administration of a collective agreement must be made before any jurisdiction over the railroad employer can be established. No such showing is alleged or made here.

Petitioner's reliance on case law developed under the Labor Management Relations Act is misplaced because the distinctive statutory differences between the Labor Management Relations Act and the Railway Labor Act have been recognized by the Supreme Court and are well established in existing Supreme Court cases dealing with the subject.

Respectfully
submitted,

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I CERTIFY that on this day of , 1983, three copies of the above were mailed first class, postage prepaid, to John D.

Alexander, Esq., 4th Floor, The World Trade Center, Baltimore, Maryland 21202.

Steven A. Loewy

APPENDIX A

Listing Pursuant to Supreme Court Rule 28.1

Consolidated Rail Corporation has no parent company. It has the following:

Majority-Owned Subsidiaries

Buffalo Creek Railroad Company

Calumet Western Railway Company

Canada Southern Railway Company

Conrail Equity Corporation

Detroit River Tunnel Company

Detroit Terminal Railroad Company

Indiana Ha rbor Belt Railroad Company

Merchants Despatch Transportation Corporation

Niagra River Bridge Company

Pennsylvania Car Leasing Company

Penn Central Communications Company

Pennsylvania Truck Lines, Inc.

St. Lawrence & Adirondack Railway Company

Affiliated Companies

Akron & Barberton Belt Railroad Company

Albany Port Railroad Corporation

Belt Railway Company of Chicago

Chicago and Western Indiana Railway Company

Fruit Growers Express Company

Illinois Terminal Railroad Company

Lake Erie and Eastern Railroad Company

Lakefront Dock & Railroad Terminal Company

Monogahela Railway Company

Nicholas, Fayette & Greenbrier Railroad Company

Peoria and Pekin Union Railway Co.

Pittsburgh, Chartiers & Youghiogheny Railway Company

Terminal Railroad Association of St. Louis

Toledo Terminal Railroad Company

Trailer Train Company

Calpro Company

Delpro Company

Hamburg Industries, Inc.

Railbox Company